Supreme Court, U.S.
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No. 10-___

IN THE

Supreme Court of the United States

MARISSA SCHAIN, ET AL.,

Petitioners,

v.

BENNO C. SCHMIDT, *IN HIS CAPACITY AS CHAIRMAN OF THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK*, ET AL.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

PHINEAS E. LEAHEY
Counsel of Record
MEIR FEDER
TODD R. GEREMIA
BRIANA R. HULET
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939
peleahey@jonesday.com

Counsel for Petitioners

QUESTION PRESENTED

Public universities may impose student activity fees when their method of allocation is "viewpoint neutral" rather than based, for example, on the majoritarian referendum used to support the Wisconsin Public Interest Research Group ("WisPIRG"). *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). Although students are comparable to the nonmember employees in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and dissenting attorneys in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), the *Abood-Keller* requirement of a refund system for speech not "germane" to the organization's mission would be "unworkable" in the academic context. *Southworth*, 529 U.S. at 231-32. A university may, but need not, substitute an "optional or refund system" for viewpoint neutrality. *Id.*

This petition presents the following question:

When a public university offers students refunds of a referendum-allocated "PIRG fee" as an alternative protection to *Southworth*'s mandate of viewpoint neutrality, are the *Abood-Keller* cases instructive in determining whether the university's notice and refund procedures satisfy the First Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners are Marissa Schain, Olivia Almengor, and Daniel Bogatin, students at Brooklyn College of the City University of New York.

Respondents are Benno C. Schmidt, in his capacity as Chairman of the Board of Trustees of the City University of New York, Philip Alfonso Berry, Valerie Lancaster Beal, Rita Dimartino, Freida D. Foster-Tolbert, Joseph J. Lhota, Hugo M. Morales, Peter S. Pantaleo, Kathleen M. Pesile, Carol A. Robles Roman, Marc V. Shaw, Charles A. Shorter, Sam A. Sutton, Jeffrey S. Wiesenfeld, Robert Ramos, Manfred Philipp, in their capacities as Trustees of the City University of New York, and Christoph M. Kimmich, in his capacity as the President of Brooklyn College.

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OPINIONS BELOW

The unpublished summary order of the United States Court of Appeals for the Second Circuit is available at 2010 WL 3736762 (2d Cir. Sept. 23, 2010) and reprinted in the Appendix at 1a-5a. The unreported orders of the District Court for the Southern District of New York are reprinted in the Appendix at 57a-65a; 6a-13a.

JURISDICTION

The United States District Court for the Southern District of New York exercised jurisdiction under 28 U.S.C. § 1331 and entered final judgment on March 16, 2010. The United States Court of Appeals for the Second Circuit exercised jurisdiction under 28 U.S.C. 1291 and entered judgment on September 23, 2010. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND UNIVERSITY REGULATIONS

The First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 are reprinted in the Appendix at 66a-68a. The Brooklyn College academic bulletin for 2007-2010 is reprinted in the Appendix at 69a-83a.[1]

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[1] Although no additional pages were cited by either party, the complete 406-page bulletin is now available at http://www.brooklyn.cuny.edu/bc/pubs/bulletin/2010/ug_bulletin2010.pdf and on the Second Circuit docket (10-1191-cv: # 125).

INTRODUCTION

Departing from *Southworth*'s "principal" First Amendment protection of "viewpoint neutrality" in the allocation of student activity fees, 529 U.S. at 233, CUNY colleges fund NYPIRG, the New York counterpart to WisPIRG, by referendum. Because referendum-based funding of such ideological groups is not viewpoint neutral, *id.* at 235, CUNY colleges have established a "refund system" for the "NYPIRG fee" as an "alternative protection."

In this case, the Second Circuit completely misconstrued *Southworth* in approving this refund system without requiring CUNY colleges to include any of the First Amendment safeguards from the *Abood-Keller* line of cases, particularly *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). The lower courts reasoned that *Southworth*'s rejection of *Abood-Keller*'s "germaneness" requirement to the student activity fee foreclosed Petitioners' proposed remedy of an individual notice and narrowly drawn refund procedure for the NYPIRG fee. While *Southworth* expressed concern that the *Abood-Keller* remedies for 623 groups—refunds for non-germane speech—could be so "disruptive and expensive that the program to support extracurricular speech would be ineffective," 529 U.S. at 231-32, *whether NYPIRG's expressive activities are germane to CUNY's academic mission is utterly besides the point.* The only issue is whether the University's refund system, its own purported substitute for viewpoint neutrality, provides adequate alternative safeguards.

Southworth thus does not preclude the application of *Abood-Keller* to "some type of optional or refund

system" or a "system of that sort." *Id.* The Second Circuit's misinterpretation to the contrary has alarming consequences for hundreds of thousands of CUNY students who are compelled to fund campus chapters of NYPIRG—a controversial advocacy group—based on the results of referenda, provided that their local college makes a refund nominally, but not practically, available.

At Brooklyn College, constructive "notice" that the NYPIRG fee is refundable is dispersed on three non-sequential pages in a 406-page academic bulletin. Dissenting students are required, each semester, to appear in the offices of NYPIRG or the college's Central Depository during an unspecified two-week period to complete a NYPIRG refund-request form. Several weeks later, NYPIRG mails a refund check, without interest, to the student's home address. Not surprisingly, only an average of *one* student per semester avails himself of the College's refund system for the NYPIRG fee.

Other public colleges with referendum-funded PIRG chapters, such as Rutgers, notify students on their bills of the PIRG fee and include a "negative check-off" allowing deduction of the fee, either on line, by mail, or in person. Pet.App. 222a.[2] This readily available alternative furnishes an all-in-one individual notice and a narrowly drawn objection procedure that not only *fully* complies with *Abood-Keller*, but is far more convenient to the College,

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[2] The example Rutgers form for NJPIRG is also available at http://www.studentabc.rutgers.edu/forms/samples/Fall2008_SampleNewBrunswick.pdf.

PIRG chapters and, most importantly, dissenting students.

Rather than requiring such an alternative or at least an improved notice and a less cumbersome procedure, the Second Circuit eviscerated with one hand this Court's protection of viewpoint neutrality and substituted with the other an unclear and onerous refund system. If the decision below is allowed to stand, CUNY (and potentially SUNY) students will have no effective remedy against forced funding of the viewpoint discriminatory NYPIRG fee. The decision may also jeopardize the First Amendment interests of students in 15 other States where PIRGs have nearly 100 chapters on college campuses.

STATEMENT OF THE CASE

The material facts are undisputed.

A. Statement of Facts

1. CUNY's Funding of Registered Student Organizations, Including NYPIRG

CUNY is a public corporation authorized by the State of New York to administer the senior colleges, community colleges, and graduate schools that are part of CUNY. N.Y. Educ. Law § 6203. Brooklyn College is a "unit" of the CUNY educational system. N.Y. Educ. Law § 6201. CUNY comprises 23 institutions and serves over 231,000 degree-credit students and 230,000 adult, continuing, and professional education students. Pet.App. 151a-152a. Brooklyn College has more than 15,000 registered students. Pet.App. 153a.

The New York Public Interest Research Group ("NYPIRG") defines itself as a student directed

research and advocacy organization addressing such issues as "global warming," "energy policy" and "social justice." www.nypirg.org; *see also Carroll v. Blinken*, 957 F.2d 991, 994-95 (2d Cir. 1992) (affirming factual finding that NYPIRG is an ideological organization). On nine CUNY campuses, including Brooklyn College, NYPIRG operates chapters which are funded by student referenda. *See, e.g.*, Pet.App. 84a-92a; 180a-187a.

More "conservative" RSOs, such as the Brooklyn College Geology Society ("BCGS") and the defunct Students for Advocacy Group Accountability ("SAGA")—in each of which Petitioner Almengor was a member—promote responsible methods of environmental research that have brought these RSOs (and faculty) into sharp ideological conflict with both NYPIRG and University officials.[3]

On each campus, including Brooklyn College, students must pay student activity fees as a condition to register for classes and to obtain transcripts. Pet.App. 188a. These fees are segregated from tuition and are used, in part, to support the activities of registered student organizations ("RSOs"). Pet.App. 193a. At Brooklyn College, the current student activity fee for each semester is $100.55 for

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[3] *See, e.g.*, Pet.App. 232a-234a (reporting acrimonious "debate" between NYPIRG and BCGS); Pet.App. 235a-267a (reporting that NYPIRG follows dissenters and compiled information on them); Pet.App. 268a-278a (unpublished orders of state and federal courts against CUNY officials enjoining interference with SAGA referenda to reduce the NYPIRG fee); Pet.App. 279a-287a (dispute between 59 CUNY scientists and CUNY officials on whether NYPIRG should be investigated for "research misconduct").

full-time students and $61.35 for part-time students. Pet.App. 89a-92a, 194a.

Under CUNY fiscal regulations, all student activity fees must be supervised by a local campus "College Association"—a committee of thirteen members drawn from college administrators, faculty and students—except where the CUNY Board of Trustees "earmarks" funds to be distributed by another "allocating body." Pet.App. 92a, 108a-109a.[4] Once disbursed to RSOs, their budgets are reviewed by the College Association and their expenditures are subject to comprehensive and detailed fiscal audit procedures (a violation of which may result in "Disciplinary Proceedings"). Pet.App. 105a-106a.

Currently, NYPIRG receives student fees based on referendum at nine CUNY colleges. www.nypirg.org/oncampus/. The CUNY Board of Trustees has "earmarked" the "NYPIRG fee" to "another allocating body," NYPIRG itself (*e.g.*, Pet.App. 90a). CUNY also exempted NYPIRG from the fiscal regulations applicable to all other RSOs and the University Student Senate. *Compare* Pet.App. 100a-103a I-XIII *with* Pet.App. 103a-104a XIV). In accordance with model Appendix AA, NYPIRG provides only an unaudited annual report describing in general terms its chapters' activities for the academic year. Pet.App. 111a-116a.[5]

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[4] The complete fiscal regulations are available at http://www.cuny.edu/about/administration/offices/sa/advocacy-referral/fiscal_accountability_handbook.pdf and in the Record of Appeal below.

[5] This type of exemption appears to be common to PIRGs nationwide. *Southworth*, 529 U.S. at 226 (noting that

Generally, the Brooklyn College Student Government distributes student activity fees to numerous ideological, political and religious RSOs, which are subject to the general fiscal regulations of the University. At Brooklyn College, these RSOs have included Adventist Students for Christ, Anti-War Coalition, Asian Student Union, Association for Women in Science, Black Family Organization, Chinese Language and Culture Club, College Democrats, Desi Culture Club, Chinese Christian Fellowship, Dominican Student Movement, Hillel Club, Haitian American Student Association, Hispanic Society, International Socialist Club, Intervarsity Christian Fellowship, Islamic Society, Jewish National Fund, Lesbian, Gay, Bisexual, Transgendered Alliance, National Association for the Advancement of Colored People ("NAACP"), New York State Israel Public Affairs Committee, Pan-African Student Alliance, Puerto Rican Alliance, Ramadan Committee, Students for Academic Freedom, Revolutionary Alliance of Womyn, and the Young Republicans. Pet.App. 200a-208a, 211a-216a.

The budgets of such RSOs are limited to a "few hundred dollars" in their first year of operation and almost never exceed a few thousand dollars. Pet.App. 118a/141a; 175a-179a. Because NYPIRG chapters are funded by campus referendum, their annual budgets vary with student enrollment. In 2007-08, NYPIRG at Brooklyn College received $137,326.00. Pet.App. 123a.

WisPIRG's "lump sum" funding is not subject to general fiscal regulations).

At CUNY colleges, the funds earmarked by referendum are not subject to reconsideration, except at the initiation of students. Pet.App.172a. To place a referendum question on the ballot that raises or lowers the portion of the fee allocated to NYPIRG, students must petition 10% of the relevant student body—*i.e.*, full-time, part time, graduate, *etc.* *Id.* If a majority of voting students vote "Agree," the results are forwarded for approval to the Board of Trustees together with the recommendation of the local college president. *Id.*; Pet.App. 180a-187a.

As a cumulative result of referenda in 1974, 1982, 1984, and 2007, the portion of the student activity fee allocated to NYPIRG at Brooklyn College has gradually increased to $5.00 and $2.00 for each full- and part-time student, respectively. Pet.App. 156a-157a, 163a, 169a, 89a-92a. The 2007 referendum also established for the first time at Brooklyn College a $5.00 NYPIRG fee for each of the college's two summer sessions. Pet.App. 91a-92a. The NYPIRG fee may not be reduced or eliminated at a CUNY college unless and "until superseded by a later referendum." Pet.App. 110a.

2. Brooklyn College's Notice and Refund Procedure for the NYPIRG Fee

The NYPIRG fee at CUNY colleges, unlike other portions of the mandatory student activity fee, is refundable. Student bills list the overall student activity fee, but not the portion allocated to NYPIRG, nor do they indicate that the NYPIRG fee exists or is refundable. Pet.App. 197a-199a. "Notice" that the NYPIRG fee is refundable is contained in the college's academic bulletin. Pet.App. 69a-83a. The bulletin directs students to appear in the offices of

either the college's Central Depository or NYPIRG. Pet.App. 82a. In either office, students must complete a NYPIRG refund request form providing their personal information, including home address. Pet.App. 134a, 137a & 230a. Neither the University nor Brooklyn College have set a time table for NYPIRG to respond to refund requests. Petitioners asserted and the courts below presumed that "several weeks" or more pass before NYPIRG mails a check to the student's home address in the amount of the original fee. Pet.App. 21a-22a, 138a.

Thus, the college's academic bulletin—a 406-page document—purportedly provides constructive notice that the NYPIRG fee is charged and refundable. The existence and amount of the "NYPIRG fee" is listed on page 29 in a section on "Tuition and Fees." Pet.App. 69a-74a. On page 32, in a subsection entitled "Refund Policy"—which otherwise addresses refunds of tuition in cases of withdrawal—the bulletin reads: "Refund of the NYPIRG fee may be obtained during a two-week refund period set by the organization." Pet.App. 78a. On page 61, an unrelated section of the bulletin containing a quarter-page description of NYPIRG indicates that the NYPIRG fee is refundable at the offices of the NYPIRG chapter or the college's Central Depository during a "two-week period." Pet.App. 82a. Neither pages 32 or 61 specifies the "two-week period."[6] Page

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[6] Although the bulletin expressly limits requests to an unspecified "two week period," Brooklyn College claimed that refunds are also available from the NYPIRG office "at any other time each semester." Pet.App.133a-134a. This unresolved dispute is immaterial to Petitioners' "*facial* challenge" to the bulletin.

61 of the bulletin does provide an unidentified telephone number—a direct line to the NYPIRG office at Brooklyn College.

When a student applies for a refund in Central Depository, his or her completed NYPIRG form is forwarded to NYPIRG which, in turn, mails a check of the fee to the student's home address. Pet.App. 134a-136a, 137a & 230a-231a. Such checks do not add interest to the NYPIRG fee for any period of time. Pet.App. 63a.

In other States, public colleges with referendum-funded PIRG chapters—such as Rutgers in New Jersey—notify students on their bills of the PIRG fee and include a "negative check-off" allowing deduction of the fee, either on line, by mail or in person. Pet.App. 217a-229a. Brooklyn College allows payment of tuition (and the unitemized student activity fee) "on line by mail [or] in person." Pet.App. 77a. To request a refund of the NYPIRG fee, however, a student has a single choice: to appear in person each term at the offices of either NYPIRG or the college's Central Depository. Pet.App. 82a. In either office, students must complete a NYPIRG refund request form requiring, *inter alia*, their names, student identification numbers, and home addresses. Pet.App. 134a, 137a & 230a-231a.

B. Proceedings Below

On July 28, 2008, Petitioners filed this civil action in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief pursuant to the First and Fourteenth Amendments and 42 U.S.C. § 1983 against the Trustees of the City University of New York and the

President of Brooklyn College in their official capacities.

Petitioners alleged four claims: (1) the University's allocation of student fees to NYPIRG compels funding of a viewpoint discriminatory fee; (2) the University's exemption of NYPIRG alone from the fiscal controls applicable to all other RSOs is not viewpoint neutral; (3) the University facilitates NYPIRG's "domination of the forum"; and (4) the University's inadequate accounting for NYPIRG's student fee expenditures violates existing circuit precedent.

In November 2009, Petitioners moved for summary judgment on their first two claims. Pet.App. 120a. The University cross-moved for summary judgment seeking dismissal of all four claims. Pet.App. 129a. The District Court denied Petitioners' motion and granted in part and denied in part the University's cross-motion. Pet.App. 57a-65a.

The Court dismissed all of Petitioners' claims, except for the "as applied" component of their second count. That unbriefed claim was "not ripe for disposition on the present motion." Pet.App. 64a. The District Court dismissed the "facial" component of Petitioners' second claim, holding that the University's exemption of NYPIRG from general fiscal controls was based on "the different nature" of NYPIRG, not favoritism of the organization's viewpoint. Pet.App. 63a. Petitioners' third and fourth claims were dismissed because the outcomes of the first and second claims would control their disposition. Pet.App. 64a.

In January 2010, the District Court endorsed the parties' Joint Pretrial Order on the remaining "as applied" component of Petitioners' second claim.

Before the Court set a trial date, the University moved to dismiss pursuant to Federal Rule of Civil Procedure 12(c). The Court granted the motion, holding that Plaintiffs failed to state an "as applied" claim on count 2 distinct from their already dismissed facial claim. Pet.App. 9a-10a. Then, on March 16, 2010, the Court entered final judgment for the University. Pet.App. 12a.

On Petitioners' first claim—the only one at issue on this Petition—the parties disputed on their cross-motions the appropriate principles of review and whether Brooklyn College's refund system for the NYPIRG fee was constitutionally adequate. The starting point for both parties was *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000). There, as at CUNY colleges, RSOs were funded by local Student Governments upon application or—in the case of WisPIRG, a counterpart to NYPIRG—by referendum. *Id.* at 223-24.

The students alleged that the university violated their First Amendment rights by compelling them to fund RSOs advancing viewpoints with which they disagreed. *Id.* at 226-27. This Court held that "objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support." *Id.* at 229. "The principal standard of protection . . . is the requirement of viewpoint neutrality." *Id* at 233. The Court did not sustain the student referendum mechanism of the University's program, "which appears to permit the exaction of fees in violation of the viewpoint neutrality principle." *Id.* at 220.

In contrast to the University of Wisconsin, CUNY adopted a "refund system" for the referendum-based

NYPIRG fee as an alternative to viewpoint neutrality. Having done so, Petitioners argued that (1) *Abood-Keller* and their progeny set forth the appropriate standard to evaluate the constitutional adequacy of CUNY's notice and refund procedures; and (2) the applicable post-*Abood* case establishing the First Amendment requirements for a refund system is *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).[7]

The District Court observed that *Southworth* limited the protection of students' First Amendment rights to "viewpoint neutrality" and thus declined to impose an "optional or refund system" in compliance with *Hudson*. In short, "the union cases simply do not apply under *Southworth*" even when reviewing the University's own refund system. Pet.App. 63a.

Having rejected Petitioners' "much discussed" union cases, including *Hudson*, as applicable or instructive, the District Court framed the constitutional standard for evaluating CUNY's refund procedure as whether it was "sufficiently burdensome in some way as to take it out of *Southworth*." Pet.App. 62a. Applying that standard, the Court held that the University's refund system for the NYPIRG fee was "entirely unobjectionable." *Id.*

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[7] *Abood*, 431 U.S. at 222, required unions to provide a *pro rata* refund to dissenting nonmember employees of expenditures for ideological activities not "germane" to collective bargaining. Otherwise, non-union "employees might . . . have become 'free riders'" on "union representation that necessarily accrues to all employees." *Keller* extended *Abood* to bar associations. 496 U.S. at 17.

Finding no defects in the refund system, the District Court turned to Petitioners' argument that students were required to provide NYPIRG with an "involuntary interest free loan" in violation of *Hudson*. The Court held that "[a] refund system inherently involves some advance of money subject to repayment, and therefore, even if . . . for some small period of time NYPIRG gets what they would characterize as an 'interest free loan,' that would be immaterial . . . ." Pet.App. 63a. The Court concluded that the dispute in this regard was a "trifle" over "as much as a nickel" or "50 cents." Pet.App. 64a-65a; *see also* Pet.App. 21a-22a ("So we're talking about an alleged involuntary loan of $5 for 3 or 4 months [at a time] which by my calculation is at 2 percent [interest] . . . Did you ever hear the maxim[] [*de*] *minimis non curat lex*?").

On March 31, 2010, Petitioners appealed to the United States Court of Appeals for the Second Circuit. On September 23, nine days following argument, the Court affirmed by summary order. Pet.App. 1a-5a. The Second Circuit also declined to apply *Hudson*'s procedural requirements—or any other level of constitutional scrutiny—to the University's refund system because:

> [T]he Supreme Court . . . has ruled that the 'union cases' do not apply to a university's assessment and distribution of a mandatory student activity fee. [Accordingly], the procedural requirements informing *Seidemann* [a Second Circuit case applying *Hudson* to union refund procedures] cannot be imposed in the instant action, and the challenged refund procedure, supported as it is by explanations offered by defendants below, is adequate as a matter of law.

Pet.App. 3a-4a (citing *Southworth*, 529 U.S. at 232).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW MISREADS *SOUTHWORTH* AND CONFLICTS WITH THIS COURT'S PRECEDENTS ON THE CONSTITUTIONAL REQUIREMENTS FOR A REFUND SYSTEM

Under *Southworth*, the minimum and appropriate First Amendment protection for fee-paying students is "the requirement of viewpoint neutrality." 529 U.S. at 233. When the fee of an ideological organization is not viewpoint neutral—as when determined by referendum—the University must substitute an alternative protection, such as an "optional or refund system." *Id.* at 232. To avoid compelled funding of expressive activities supported by a non-neutral referendum-based fee, the refund system may not be a sham, but must equal the "minimum" protection abandoned by the University. For example, an uninformative or inaccessible notice

combined with unnecessarily cumbersome procedures would be tantamount to no refund system at all. *Hudson*, 475 U.S. at 303 & n.12 ("First Amendment rights are fragile and can be destroyed by insensitive procedures") (internal citations and quotation marks omitted).

On the issue of whether a refund system affords sufficient protection for dissenters, the *Abood-Keller* cases provide the closest and most instructive analogy. *Southworth*, 529 U.S. at 231-32 ("the rights acknowledged in *Abood* and *Keller* become implicated" by compelled funding of expressive activity on college campuses). *Southworth*'s rationale for not requiring the *Abood-Keller* remedy—*i.e.*, a refund system for non-germane student fee expenditures—is supported by "the mandate of viewpoint neutrality." Given the absence of viewpoint neutrality in the allocation of the NYPIRG fee at CUNY, *Abood-Keller* is not only "implicated," but essential to avoid impermissibly compelled speech. The lower courts' holdings to the contrary are based on a fundamental misreading of *Southworth*.

Their reasoning—grounded in *Southworth*'s rejection of the "germaneness" requirement to the student activity fee—is flatly inconsistent with *Southworth*. While this Court expressed concern that the *Abood-Keller* remedies for 623 RSOs—refunds for non-germane speech—could be so "disruptive and expensive that the program to support extracurricular speech would be ineffective," 529 U.S. at 231-32, whether NYPIRG's expressive activities are germane lacks relevance. Rather, the sole issue is whether the University's refund system,

its own purported substitute for viewpoint neutrality, provides adequate alternative safeguards or, more broadly stated, what are the constitutional requirements applicable to "some type of optional or refund system" or a "system of that sort?" *Id.*

The Second Circuit turns *Southworth* upside down by reasoning that because a refund system is not required in a viewpoint neutral forum that a notice and refund procedure *adopted as an alleged adequate substitute for viewpoint neutrality* may evade constitutional review. The Second Circuit's rejection of this critical distinction resulted in approval of a refund system rife with constitutional defects and endorsement of the principle that students may be compelled to pay a viewpoint discriminatory fee provided a refund is theoretically, but not practically, within reach—at least without the clairvoyance to find an opaque constructive notice followed by frenetic and burdensome efforts.

Finally, this Court's precedent on the requirements of a refund system in the *Abood-Keller* cases are highly instructive where the University uses a refund system for a referendum-based fee. While the notice and procedures for dissenting nonmember employees, bar members and students need not be identical, each must satisfy the constitutional *minimum* appropriate for their respective contexts. *Cf. Southworth*, 529 U.S. at 231 (discussing differing "means of implementing First Amendment protections" and noting that "form" which a constitutional rule assumes depends on context). CUNY's notice and refund procedure at Brooklyn College patently fails *Hudson*'s requirements and the Second Circuit, by misreading *Southworth*, endorsed

a wholly inadequate alternative to viewpoint neutrality.

In *Hudson*, this Court imposed three basic requirements, each of which applies to a University refund system. First, the union's refund procedures must be "carefully tailored to minimize the infringement" on dissenting employees' exercise of their First Amendment rights to object. *Id.* at 303. Second, the individual notice provided to nonmember employees must contain adequate "information about the basis for the proportionate share" of the fee due to the union. *Id.* at 306. Third, the refund system may not use a "pure rebate approach," *i.e.* "a forced exaction followed by a rebate equal to the amount improperly expended." *Id.* at 303-06 (applying *Ellis v. Bh'd of Railway Clerks*, 466 U.S. 435, 443 (1984)). Otherwise, "the union obtains an involuntary loan" for expressive activities to which the employee objects and poses "the risk that dissenters' funds may be used temporarily for an improper purpose." *Id.* at 304, 305.

The application of *Hudson*'s requirements for the union to provide adequate individual, not constructive, notice and to "minimize the infringement" with less cumbersome procedures supports the use of Rutgers' semester-by-semester optional or negative check off system for NJPIRG—a readily available alternative which resolves *all* the defects in CUNY's procedure, including involuntary and interest free loans. Pet.App. 222a; *supra* n.2. Alternatively, and at minimum, CUNY's current notice and refund procedure for the NYPIRG fee should have been declared insufficiently tailored and the issue remanded for consideration under the

appropriate constitutional standard. Neither occurred and, as a consequence, CUNY students lack the protection of *either* viewpoint neutrality or an appropriately tailored refund system.

II. THE DECISION BELOW EVISCERATES *SOUTHWORTH*'S MINIMUM PROTECTION OF VIEWPOINT NEUTRALITY WITHOUT ENSURING SUFFICIENT ALTERNATIVE SAFEGUARDS

The Second Circuit's misinterpretation of *Southworth* has resulted in a "refund system" free and clear of any meaningful First Amendment scrutiny, eviscerating the protections afforded by this Court. Whether considered individually—or as more appropriate, collectively, *see Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842, 849 (7th Cir. 2000)—CUNY's procedures fail even the lowest level of scrutiny and are not adequate "compensation" for removing the protection of viewpoint neutrality.

As noted, the Brooklyn College bulletin purports to accept refund requests during an *unspecified* "two-week period" to be set by NYPIRG or the college. Pet.App. 78a, 82a. A First Amendment notice—or any notice—requires at minimum a definite and knowable time frame without the need for a potential dissenter to conduct his or her own investigation. Second, the bulletin disperses relevant information about refund of the NYPIRG fee on three pages (29, 32, and 61) in a 406-page document without cross-reference and no single page provides complete and accurate notice (*i.e.*, a description of NYPIRG, the amount of the fee, and where refund requests are available during a two-week period). Pet.App. 69a-83a. Finally, the First Amendment requires

individualized notice where feasible, not constructive notice in a voluminous academic bulletin.

Assuming a student discovers the constructive notice in the college bulletin, he or she then encounters an extraordinarily cumbersome objection procedure, which lacks any rational justification and allows NYPIRG to benefit from student inertia and deterrence in violation of *Hudson*. *Compare, e.g., Shea v. Int'l Ass'n of Mach. & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998) ("unduly cumbersome annual objection requirement [was] designed to prevent employees from exercising their constitutionally-based right of objection"); *accord Seidemann v. Bowen*, 499 F.3d 119, 124 (2d Cir. 2007) (["*Shea*] . . . followed *Hudson*'s admonition that a union adopt those reasonably practicable procedures that least interfere with an objecting employee's exercise of his First Amendment rights.") (internal quotation marks omitted); *Tavernor* 226 F.3d at 849 ("No sooner does the objector complete one round than, like Sisyphus with his rock, he must begin anew with another.").

As the Third Circuit explained in requiring a negative check-off box for referendum-funded NJPIRG:

> We have been presented with no convincing reason—besides the obvious motive to procure additional funding from those students who do not wish to join PIRG but who are indifferent enough to forego seeking a refund—why PIRG could not obtain its financial support through purely voluntary contributions.

Galda v. Bloustein, 686 F.2d 159, 169 n.17 (3d Cir. 1982).

CUNY colleges encourage payment of tuition and the unitemized student activity fee on line or by first class mail, Pet.App. 77a; however, to request a refund of the NYPIRG fee, a student must appear in person 2-4 times per year—depending on whether he or she registers for summer courses—to complete a NYPIRG request form for a $2.00-$5.00 dollar refund. Pet.App. 82a, 134a.

Further, the college in turn forwards the dissenter's name, home address, and student ID number to NYPIRG, which discourages students unwilling to reveal their identities and personal information to NYPIRG or even a college administration that sides with NYPIRG on controversial disputes. *Supra* n.3. Thus, the refund procedure here impinges *further* on students' First Amendment interests than ordinary "inertia" with a classic "chilling effect" on the exercise of their rights and requires a reasonable alternative that dispenses with the requirement to repeatedly confront NYPIRG or the college.

Not surprisingly, the undisputed (and unanswered) factual evidence also supported Petitioners' facial challenge. In 2008, even the College's Director of Legal Services Pamela Pollack and Defendant President Kimmich were unaware of page 61 of the college bulletin which has purportedly allowed students since 2003-04 to complete a NYPIRG refund request form with the college. Pet.App. 143a-146a, 82a. Additionally, Brooklyn College conceded that an average of only *one* student per term completes the NYPIRG refund request with Central Depository

including a year in which more than 1/3 of the electoral turnout voted against increasing the regular NYPIRG fee and authorizing summer fees. Pet.App. 135a, 180a-187a.

Finally, students repeatedly pay an involuntary interest-free loan for weeks, if not months, before receiving a check from NYPIRG for the exact amount of the fee paid. As in *Hudson*, 475 U.S. at 309, that poses the unacceptable risk that dissenter funds will be used, even if only temporarily, for an impermissible purpose. This safeguard against involuntary interest free loans should extend to any context in which State action poses a similar risk. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Here, no reason, not even the insufficient one of convenience, has been or can be given to justify the contrary.

There are two permissible alternatives to CUNY's "pure rebate" approach: an "interest bearing escrow" account or an "advanced reduction" (or rebate). *Hudson*, 475 U.S. at 303-04. The lower courts considered neither of these applicable under *Southworth* and deemed the case a "trifle" over "as much as a nickel," Pet.App. 64a-65a, which stands in direct contrast to this Court's solicitous regard for other dissenting fee payers. *Hudson*, 475 U.S. at 306 n.15 (agreeing with James Madison on the "tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'") (quoting *Abood*, 431 U.S. at 235).

In applying *Hudson* to this case, *Southworth*'s disjunctive phrase, an "optional or refund system," need not be read literally. Not having addressed the issue here—the constitutional requirements for a University's refund system—this Court should adopt whichever of the two satisfies *Hudson*. Rutgers' opt-out box for NJPIRG has not only been "workable" for more than two decades, but *more* convenient for all parties involved and the *only* alternative suggested in this litigation that eliminates all the above constitutional defects in CUNY's procedure.[8]

The negative check-off is the equivalent of an "advanced rebate" with a fair notice and objection procedure rolled into one. Pet.App. 217a-229a. Rutgers colleges notify students on their bills each semester of the NJPIRG fee and include the option to deduct the NJPIRG fee from their invoices, either on line or by mail. An interest-bearing escrow account would also solve the problem of interest free loans; however, because no amount of the NYPIRG fee is subject to arbitration to determine the "germane" share, but 100% of the NYPIRG fee is refundable, there is no rationale for denying the readily available alternative of an advanced rebate.

Further, the First Amendment permits and state or federal law authorizes unions to retain the portion of fees expended on collective bargaining efforts

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[8] *Galda v. Rutgers*, 772 F.2d 1060, 1068 & n.5 (3d Cir. 1985) (Rutgers must adopt procedure of Universities of Minnesota and Massachusetts which "allow students to decide in advance if they wish to support PIRG"); Pet.App. 217a-229a. Under *Southworth*, *Galda*'s remedy continues to be required because the referendum funding of NJPIRG is not viewpoint neutral.

explaining their choice between an escrow or advanced reduction (which may be extrapolated from the previous year's budget and "promptly" adjusted in arbitration for the current year). NYPIRG, in contrast, has no comparable legal authorization or mandate to represent students and no portion of the fee is due to the organization. *See also Carroll v. Blinken*, 957 F.2d 991, 1003 (2d Cir. 1992) (enjoining NYPIRG from deeming student fee payers to be automatic members). NYPIRG, therefore, has no "free rider" claim, as do exclusive bargaining agents, which must fulfill a duty of fair representation to all employees, including nonmembers. Based on this distinction between unions and NYPIRG, the University (and NYPIRG) have *less* of a state interest, if any at all, in allowing NYPIRG to retain the full fee and to provide refunds later on without interest.

In sum, the Second Circuit's misreading of *Southworth* to exclude *Hudson* or any comparable scrutiny of CUNY's refund system will, as occurred here, result in the approval of virtually any notice and procedure that the University proffers for PIRG chapters (or any other ideological RSO). As such, the decision below undermines both *Southworth* itself and the general presumption that "courts remain available as the ultimate protectors of constitutional rights." *Hudson*, 475 U.S. at 307 n.20.

III. THE DECISION BELOW MORE BROADLY THREATENS TO COMPROMISE THE FIRST AMENDMENT INTERESTS OF STUDENTS AT PUBLIC COLLEGES IN AT LEAST 15 OTHER STATES

Despite the lower courts' dismissiveness of Petitioners' claim, this Court has repeatedly commanded that "*whatever the amount*, the quality of [Respondents'] interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." *Hudson*, 475 U.S. at 305 (emphasis added). Furthermore, while the NYPIRG fee at Brooklyn College amounts to only $5.00 each term, none can deny that this yields more than $137,000 in unconstitutionally apportioned (and scarcely regulated) funding to annually. Throughout CUNY, NYPIRG chapters receive an additional $800,000 by referendum (and the only requirements for further increases in these fees are more student referenda).

The Second Circuit's approval of compelled funding of a discriminatory fee at CUNY alone without an effective remedy is more than sufficient cause for alarm as hundreds of thousands of fee-paying students attend public colleges at CUNY and SUNY in New York. In addition, ConnPIRG and VPIRG, located in Connecticut and Vermont, respectively, are within the Second Circuit. Nor should a wider impact be discounted as news of the decision below reaches the combined 100 PIRG campus chapters which are no doubt interested in the ideal system for maximizing their referendum (and non-referendum) budgets on campus. *See* www.uspirg.org/about-us/the-state-pirgs (identifying 26 state PIRGs, 16 of

which have one or more student fee funded chapters on University campuses). Universities and colleges all across the country may even seek to maximize the fees of favored RSOs other than PIRG chapters—liberal or conservative—with a CUNY-style constructive notice and cumbersome procedure instead of an existing optional check-off box on bills, a narrowly drawn refund system, or a viewpoint-neutral method of non-referendum allocation.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PHINEAS E. LEAHEY
Counsel of Record
JONES DAY
MEIR FEDER
TODD R. GEREMIA
BRIANA R. HULET
222 E. 41st St.
New York, NY 10017
(212) 326-3939
peleahey@jonesday.com

Counsel for Petitioners

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